BEFORE THE SUPREME COURT
STATE OF MISSOURI

SUBSTITUTE BRIEF OF APPELLANT
NATIONAL FABCO/ROYAL & SUNALLIANCE INS. CO., INC.

NO. SC84220

JAMES OSWALD,
Respondent/Appellee/Employee,

v.

NATIONAL FABCO/ROYAL & SUNALLIANCE INS. CO., INC.
Appellant/Employer & Insurer.

ON TRANSFER FROM THE COURT OF APPEALS, EASTERN DISTRICT

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JURISDICTIONAL STATEMENT

This is an appeal of an Award of workers' compensation benefits issued by the Honorable Administrative Law Judge John Percy against National Fabco, Mfg. Inc. (hereinafter "National Fabco") and Royal and SunAlliance Insurance Co, Inc. Judge Percy apportioned liability between Southern Equipment Co. (hereinafter "Southern"), Claimant's first employer, and National Fabco, Claimant's last employer.

A timely appeal was filed with the Labor and Industrial Relations Commission by National Fabco. The Commission modified the award and placed all liability on National Fabco.

Thereafter, a timely appeal was made to the Court of Appeals, Eastern District. The Court of Appeals affirmed the Commission's award but authored an opinion that the Exception to the Last Exposure Rule, §287.067.7 RSMo 1994, did not apply to the present case. A factually similar case with a contrasting opinion, Endicott v. Display Technologies (SC84044) was decided within a two week period of the present case by the Court of Appeals, Southern District. It is presently pending before this Court. An Order of Transfer to the Missouri Supreme Court was issued in this case by the Court of Appeals, Eastern District, on January 11, 2001 pursuant to Appellant's Motion for Rehearing and Alternative Application for Transfer.

This Court has jurisdiction over this matter under Article V, Section 10 of the Missouri Constitution and Rule 83.02 of the Missouri Rules of Civil Procedure.

PROCEDURAL HISTORY

James Oswald ("Claimant") filed a Claim for Compensation on March 12, 1997. In his Claim, he alleged repetitive trauma injuries to his hands, wrists, arms, and body as a whole. The Claim named National Fabco, Quipco Mfg. Co. (hereinafter "Quipco"), and Southern as his employers. Claimant later filed an Amended Claim adding the left shoulder as an injured body part. Claimant filed another Amended Claim on June 4, 1997 in order to add additional insurers as parties to the Claim. A Third Amended Claim was filed on March 24, 1998 in order to include the Second Injury Fund as a party. National Fabco filed timely Answers to each Claim asserting a general denial of all allegations.

The hearing of this Claim before Administrative Law Judge John Percy in St. Louis occurred on January 19, 2000. The main issue addressed in this hearing was which of several employers is liable for Claimant's repetitive trauma injuries including bilateral carpal tunnel syndrome and a rotator cuff tear.

On April 25, 2000, Judge Percy issued his Award. He awarded Claimant 17.5 weeks of permanent partial disability (PPD) at a rate of $235.61 per week for a total of $4,123.18 against Southern and Security Insurance Co., its insurer. He also awarded a total of 168.7 weeks of PPD at a rate of $268.72 per week for a total of $45,333.06 against National Fabco and Royal & SunAlliance Insurance Co., its insurer.

The Application for Review by National Fabco was filed in a timely manner. The Industrial Relations Commission granted the request for oral arguments. Oral Arguments were held on November 9, 2000. The Commission issued an opinion on December 8, 2000 in which it modified the award of ALJ Percy. The Commission held National Fabco and Royal &

SunAlliance Insurance Co. liable for all of Claimant's disability, including the amount previously awarded against Southern and a twenty percent load factor. The appellant filed a timely appeal to the Court of Appeals, Eastern District.

The Court of Appeals, Eastern District affirmed the award of the Labor and Industrial Relations Commission but included an opinion explaining and interpreting sections 287.063 and 287.067.7 RSMo. A Motion for Rehearing and/or Transfer was timely filed with the Court of Appeals, Eastern District. On January 11, 2002 the Court of Appeals ordered the case transferred to the Supreme Court.

Appellant National Fabco requested by letter to the Clerk of the Supreme Court dated January 28**,** 2002 that this matter be set for oral arguments on the same date as Endicott v. Display Technology (SC84044) a decision of the Court of Appeals, Southern District, which is in direct conflict with the decision reached in this case.

STATEMENT OF FACTS

The facts are not in dispute. Claimant began working at Southern Equipment Company on August 19, 1952 and worked there continuously for 43 years. (Transcript 22). He initially worked forty hours per week as an assembler. (Tr. 31). Claimant's job duties as an assembler included using pens, pencils, rulers, and T-squares in order to do shop drawings for sheet metal work. (Tr. 60). Claimant was also required to do occasional lifting and cleaning up around his work area. (Tr. 28, 31).

Sometime in the mid 1960's Claimant became a layout assembler, still at Southern Equipment. (Tr. 63). In this job he was required to use rulers, T-squares, and a scribe to take paper drawings similar to what he had previously made and scribe them onto the sheet metal. (Tr. 26, 60). This required somewhat more effort than the pen and pencil drawing Claimant had previously done.(Tr. 64) Claimant continued to work as a layout assembler until the mid 1970's when he became a sheet metal journeyman. (Tr. 61). Claimant's work as a journeyman was similar to his previous work as an assembler. (Tr. 63). Claimant continued to do his duties as a journeyman at Southern Equipment until March 30, 1995. (Tr. 89). By the end of his employment at Southern Equipment, Claimant was working approximately 55 hours per week on average. (Tr. 62).

After leaving Southern Equipment, Claimant began working at Quipco on approximately April 7, 1995. (Tr. 24). At Quipco, Claimant's job duties were substantially the same as they were while he was a journeyman at Southern Equipment. (Tr. 30, 31). He used pens, pencils, rulers, and T-squares to make shop drawings for sheet metal. (Tr. 29, 30). Claimant worked

between sixty and sixty-five hours per week for the four months that he worked at Quipco. (Tr. 62).

After leaving Quipco, Claimant began working at National Fabco. (Tr. 24). Claimant's job duties at National Fabco were substantially similar to his duties as a layout assembler at Southern Equipment. (Tr. 30). That is, he was required to use a scribe to transfer paper drawings onto sheet metal. (Tr. 30, 31). Claimant worked forty hours per week at National Fabco until he was laid off March 3, 1997. (Tr. 23, 63). Claimant had already planned to retire on March 29, 1997. (Tr. 24).

Claimant alleges that he has suffered bilateral carpal tunnel syndrome as well as bilateral rotator cuff tears as a result of repetitive trauma. (Tr. 342) Claimant has had bilateral carpal tunnel release surgery and has had the left rotator cuff tear repaired. (Tr. 305). There is no dispute that Claimant also has a torn right rotator cuff. (Tr. 242).

The medical records indicate that Claimant suffered a traumatic injury to his right shoulder in February of 1990. (Tr. 241). After some prodding, Claimant recalled an incident in which he and a co-worker were pouring a twelve foot die out of a press brake. (Tr. 33). The Claimant went to catch the die and it jerked his arm. (Tr. 33). Claimant did not immediately report this injury or seek medical treatment. (Tr. 33). Judge Percy correctly ruled that this claim was time-barred by the statute of limitations. This issue is not the subject of review.

Claimant first saw a doctor regarding the injuries listed above on November 5, 1990. (Tr. 34). At that appointment, Dr. Petkovich diagnosed a possible right rotator cuff tear, recommended an arthrogram of the right shoulder, and noted that Claimant was scheduled to

see Dr. Phillips regarding possible nerve compression of the wrists. (Tr.69, 176). Claimant did see Dr. Phillips on November 17, 1990. (Tr. 67). According to Dr. Phillips, an arthrogram had confirmed a tear of the right rotator cuff. (Tr. 242). Dr. Phillips also diagnosed Claimant with bilateral carpal tunnel syndrome after performing an EMG\NCV. (Tr. 242).

Claimant returned to Dr. Petkovich for follow-up on November 30, 1990. (Tr. 7). Dr. Petkovich confirmed the findings of bilateral carpal tunnel syndrome and a right rotator cuff tear, and he recommended that Claimant undergo surgery to repair all three conditions. All of these diagnoses were made while Claimant was still working at Southern. (Tr. 8). Unfortunately, Claimant never contacted Dr. Petkovich to schedule the necessary surgeries. (Tr. 250). Claimant continued to work; however, he modified the way in which he worked. (Tr. 58). He used his left hand more and had to take breaks in order to rub his hands when they went numb. (Tr. 58).

Claimant did not see another doctor regarding these problems until December 30, 1996. (Tr. 70, 141). He returned to Dr. Petkovich for an IME. (Tr. 178). Dr. Petkovich confirmed his earlier diagnosis of bilateral carpal tunnel syndrome and bilateral rotator cuff tendonitis, which he attributed to repetitive work. (Tr. 258).

There is a note in the file from Dr. Phillips dated December 13, 1996 and addressed to Dr. Tucker. (Tr. 256). In that note he confirms that Claimant had been diagnosed with bilateral carpal tunnel syndrome and a rotator cuff tear in 1990 but that surgery had not been performed. (Tr. 256). There is also an office note from Dr. Phillips dated January 9, 1997.

(Tr. 262). In that note he reiterates that Claimant had surgical level carpal tunnel as early as November of 1990 and that he had a work-related injury to his right shoulder. (Tr. 262). While Dr. Phillips was unable to offer a definitive statement regarding causation, he did opine that if any employment was the cause of Claimant's carpal tunnel, it was the earlier, longstanding employment at Southern. (Tr. 262).

Claimant was eventually referred to Dr. Benz, who confirmed the previous diagnoses. (Tr. 264). Dr. Benz performed surgery to repair Claimant's torn left rotator cuff tear on March 19, 1998. (Tr. 305). He performed right and left carpal tunnel releases on October 1, 1997 and October 29, 1997 respectively. (Tr. 305). These surgeries and all related appointments with Dr. Benz were paid for by employer/insurer National Fabco, who now seeks reimbursement for these costs. (Tr. 2).

POINTS RELIED ON

THE COURT OF APPEALS, EASTERN DISTRICT, ERRED IN FINDING EMPLOYER/INSURER NATIONAL FABCO AND ROYAL & SUNALLIANCE INSURANCE CO. RESPONSIBLE FOR CLAIMANT'S BILATERAL CARPAL TUNNEL SYNDROME IN THAT THEY INCORRECTLY INTERPRETED SECTIONS 287.063 AND 287.067.7 RSMO TO REQUIRE A REDIAGNOSIS OF THE CLAIMANT'S CONDITION IN THE FIRST THREE MONTHS OF CLAIMANT'S LAST EMPLOYMENT PRIOR TO THE DATE THE CLAIM FOR COMPENSATION IS FILED.

Johnson v. Denton Construction Co., 911 S.W.2d 286 (Mo. banc 1995).

Cox v. Tyson Foods, Inc., 920 S.W.2d 534, (Mo. banc 1996).

Arbeiter v. National Super Markets, Inc., 990 S.W.2d 142 (Mo.App.E.D.1999).

Cuba v. Jon Thomas Salons, Inc., 33 S.W.3d 542 (Mo. App. E.D. 2000).

Maxon v. Leggett &Platt, 9 S.W.3d 725 (Mo. App. S.D. 2000).

Wiele v National Supermarkets, Inc., 948 S.W.2d. 142 (Mo. App. E.D. 1997).

Merriman v. Ben Gutman Truck Service, Inc., 392 S.W.2d 292 (Mo. 1965).

Cook v. Sunnen Products Corp., 937 S.W.2d 221 (Mo. App. E.D. 1996).

Davis v. Research Medical Center, 903 S.W.2d 557 (Mo. App. W.D. 1995).

§287.495 RSMo 1994

§287.063.1 RSMo 1993

§287.063.2 RSMo 1993

§287.067.7 RSMo 1994

STANDARD OF REVIEW

When reviewing a decision of the Labor and Industrial Relations Commission ("Commission"), this Court is guided by a well-defined standard of review. Findings of ultimate facts can be modified by this Court only if no substantial evidence was presented to support the Commission's award, or in the alternative, such award is clearly contrary to the overwhelming weight of the evidence. Cook v. Sunnen Products Corp., 937 S.W.2d 221,224 (Mo. App. E.D. 1996) citing Davis v. Research Medical Center, 903 S.W.2d 557,569 (Mo. App. W.D. 1995). As to questions of law, this Court *conducts an independent review.* §287.495 RSMo 1994; *see also* Johnson v. Denton Construction Co., 911 S.W.2d 286 (Mo. banc 1995). The Court reviews the Commission's rulings of law as well as the Appellate Court's rulings of law *de novo.* Cox v. Tyson Foods, Inc., 920 S.W.2d 534, 535 (Mo. banc 1996). Findings of ultimate facts reached through application of rules of law, rather than by natural reasoning based on facts alone, are conclusions of law. Wiele v National Supermarkets, Inc., 948 S.W.2d. 142, 145 (Mo. App. E.D. 1997) citing Merriman v. Ben Gutman Truck Service, Inc., 392 S.W.2d 292, 297 (Mo. 1965).

ARGUMENT AND AUTHORITIES

THE COURT OF APPEALS, EASTERN DISTRICT ERRED IN FINDING EMPLOYER/INSURER NATIONAL FABCO AND ROYAL & SUNALLIANCE INSURANCE CO. RESPONSIBLE FOR CLAIMANT'S BILATERAL CARPAL TUNNEL SYNDROME IN THAT THEY INCORRECTLY INTERPRETED SECTIONS 287.063 AND 287.067.7 RSMO TO REQUIRE A REDIAGNOSIS OF THE CLAIMANT'S CONDITION IN THE FIRST THREE MONTHS OF CLAIMANT'S LAST EMPLOYMENT PRIOR TO THE DATE THE CLAIM FOR COMPENSATION IS FILED.

Claimant suffers from an occupational disease/accident as a result of exposure to repetitive trauma through his employment. The only issue to be determined is whether the Court of Appeals, Eastern District properly interpreted and applied the last exposure rule, section 287.063.1 and 287.063.2 RSMo 1993, and the exception to the last exposure rule found in section 287.067.7 RSMo 1994.

Section 287.063 states as follows:

> 1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, ***subject to the provisions relating to occupational disease due***

to repetitive motion, as is set forth in subsection 7 of section 287.067, RSMo. (emphasis added).

2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease ***for which claim is made*** regardless of the length of time of such last exposure. 287.063 RSMo 1993 (emphasis added).

Section 287.067.7 RSMo states:

With regard to occupational disease ***due to repetitive motion***, if the exposure to the repetitive motion ***which is found to be the cause of the injury*** is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease. §287.067.7 RSMo 1994 (emphasis added).

The Missouri Supreme Court first addressed the last exposure rule in Johnson v Denton, 911 S.W.2d 286 (Mo. banc 1995). In Johnson, the Claimant was diagnosed with a repetitive

trauma condition while working for the first employer, Denton Construction. Id. Also, the Claimant filed a Claim for Compensation the day after his last day of work with the first employer. Id. However, the Claimant did go to work for a second employer within one week of leaving the first employer. Id. The Claimant was exposed to the hazards of repetitive trauma in an almost identical fashion while working with the second employer. Id.

The Court in Johnson, found the first employer liable for payment of workers' compensation benefits because the Claim for Compensation was filed before the Claimant began work with the second employer. Id. In so doing, the Court focused on the language of section 287.063.2 RSMo 1993. The Court reasoned that the phrase "for which claim is made" within this statue was the operational phrase with respect to timing and was crucial. Id. The Court also stated that an employer that hires someone after they file a claim for injury can not be responsible for the injury "for which claim is made ." Id. The filing of a claim contemplates the accident and injury occurring before the claim was filed not an injury to occur in the future.

However, the Johnson Court also warned that their decision was specifically limited to the facts in that case. Id. The court observed "although the date the claim was filed was clearly dispositive in Johnson, in other cases it may well be the 'starting point '." Arbeiter v. National Supermarkets, Inc., 990 S.W.2d 142 (Mo. App. E.D.1999). Johnson was decided before the exception to the last exposure rule was enacted. Therefore, they did not interpret same. Based on the ruling in Johnson, the employer that last exposes the Claimant to the hazards of repetitive trauma before the filing of the Claim for Compensation is presumptively liable.

Johnson at 288. However, the analysis does not end at this point.

The Court of Appeals first took up the application of section 287.067.7 RSMo in Arbeiter v. National Super Markets, Inc., 990 S.W.2d 142 (Mo. App. E.D. 1999). This section is commonly referred to as the three month exception to the last exposure rule. The Eastern District of Missouri has ruled that the date of diagnosis is the key date in determining which employer is liable under the exception to the last exposure rule. Id. In Arbeiter , the Claimant was diagnosed with carpal tunnel while working for the original employer, National Supermarkets. She was rediagnosed after less than three months of work at Schnuck's grocery stores. However , the claim was not filed until Claimant had been working at Schnuck's for more than three months. National argued that Schnuck's was the responsible party because they were the last employer to expose the Claimant to the hazards of repetitive motion before the claim was filed and because they had employed her for more than three months by the time the claim was filed. The Court disagreed. It focused on the language italicized below and concluded that the date of diagnosis controls. Id.

The Arbeiter Court focused on the language of section 287.067.7 RSMo 1994 just as the Johnson Court focused on the language of section 287.063.2 RSMo 1993. The Arbeiter Court found the operational phrase with respect to timing in section 287.067.7 was not "for which claim is made" as was seen in section 287.063.2, but rather, "if the exposure to the repetitive motion ***which is found to be the cause of the injury***..." (emphasis added.)

The timing factor in the three month exception set forth in section 287.067.7 is not the date the claim is filed but the determination that repetitive motion has resulted in an

occupational disease or date of diagnosis. Arbeiter at 144. The Court in its analysis stated:

> Just as an employer who hires someone after they file a claim for injury cannot be responsible for the injury 'for which claim is made,' exposure to repetitive motion after an employee has been diagnosed as suffering from occupational disease due to repetitive motion cannot be the 'cause' of the disease. The subsequent exposure may increase the symptoms of the disease but it cannot be the cause of the disease. Thus, only exposure prior to the diagnosis of occupational disease due to repetitive motion should be considered. Arbeiter at 144.

The Court logically reasoned that exposure to repetitive motion after an injury has been diagnosed cannot be the cause of the injury. The Court observed that although it was difficult to determine the first date of an occupational disease, it was clear that the cause of the occupational disease could not occur after the original diagnosis.

The Arbeiter Court provided the second part of the analysis. "If the employer on the date the claim is filed has exposed the employee to the repetitive motion found to be the cause of the disease for less than three months *at the time the disease is diagnosed*, and exposure to the repetitive motion by a prior employer is shown to be a substantial contributing factor, liability is shifted to the prior employer. Id. at 145. In the present case, National Fabco had not even employed the Claimant for one day when the disease was diagnosed. Therefore, it is clear that the work at National Fabco could not be the "cause" of the repetitive trauma injuries, bilateral carpal tunnel syndrome and left rotator cuff tear.

Cuba v. John Thomas Salons simply affirmed that the date of filing a claim for compensation was not the sole factor to consider in deciding liability between employers. Cuba v. John Thomas Salons , 33 S.W.3d 542 (Mo. App. E.D. 2000). The Cuba Court held that the date the occupational disease is diagnosed is the controlling date in applying the exception to the last exposure rule. Id.

The Court of Appeals, Eastern District, in the present case formed a decision directly conflicting with the rationale expressed in Arbeiter and affirmed in Cuba v. John Thomas Salons. In the present case, the Appellate Court held that the exception to the last exposure rule did not apply because the Claimant was not diagnosed with bilateral carpal tunnel syndrome within the first three months of his employment at National Fabco, although he was diagnosed with the condition before working at National Fabco. The Court was apparently requiring a rediagnosis of the condition in the first three months of his employment. This additional requirement was contrary to the logic expressed in Arbeiter.

In both Arbeiter and Cuba the Claimant was actually diagnosed with the occupational disease while working for the first employer and rediagnosed in the first three months of work with the second employer. However, the statute does not require a "rediagnosis" of the condition with the last employer prior to the filing of the claim. According to section 287.067.7, the only prerequisite for applying the statute is that the occupational disease at issue be caused by repetitive trauma or repetitive motion. The statute is intended to differentiate those occupational diseases caused by repetitive motion such as carpal tunnel from those occupational diseases simply caused by exposure such as asbestosis. The

"exposure causing" occupational diseases are governed only by section 287.063 RSMo 1993. They do not fall within the exception to the last exposure rule, section 287.067.7.

The last exposure rule does not require a confirmation or affirmation of the cause or diagnosis of the condition in the first three months of employment with the last employer. Therefore, every case where the occupational disease is allegedly caused by repetitive motion will be evaluated under this statute in determining liability between employers.

Section §287.067.7 also requires as a prerequisite an identification of the "cause" of the injury which the courts have appropriately found to be the date of diagnosis. The next question is not whether the Claimant was "rediagnosed" in the first three months of employment with the last employer, but rather, at the time of the original diagnosis did that employer expose the Claimant to the hazards of repetitive trauma for less than three months. If the employer, at the time of the original diagnosis, has not exposed the Claimant to the hazards of repetitive trauma for more than three months and the evidence demonstrates that the exposure to repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer is liable for the occupational disease. This analysis is more consistent with the intent of section 287.067.7, the rationale in Arbeiter and Cuba, and the decision of the Court of Appeals, Southern District in Endicott v. Display Technologies (SC84044). If no diagnosis has occurred by the date the Claim for Compensation is filed, the Claim date is the date "which is found to be the cause of the injury" pursuant to §287.067.7 and Johnson. Johnson v. Denton Construction Co., 911 S.W.2d 286 (Mo. banc 1995).

The whole intent of enacting the exception to the last exposure rule was to avoid

penalizing employers who employed workers that already had "repetitive motion" occupational diseases "caused" by prior employers. Requiring a rediagnosis of a "repetitive motion" occupational disease within the first three months of employment at a new employer would eliminate the purpose of the rule. As the court is well aware, an employer can not ask a prospective employee of their existing medical conditions in preemployment interviews. The only way for an employer to know with certainty that a new employee has a repetitive motion occupational disease is by clinical testing and/or diagnostic testing by an EMG\NCV. It is a burdensome request of an employer and expensive to have EMGs\NCVs performed of every new employee to be sure they get the protection of 287.067.7. However, this testing and inquiry would be necessary by employers of their new employees based on the interpretation of this section by the Court of Appeals, Eastern District in this case. In fact, even if the new employee advised their new employer of a prior diagnosis of a repetitive motion occupational disease, such as carpal tunnel syndrome, within the first three months of his employment that would not be sufficient to have the protection of the exception to the last exposure rule according to the Eastern District's analysis . The company would then need to send the employee out to obtain a doctor's diagnosis.

The court in this case has misinterpreted section 287.067.7 to include a "rediagnosis" in the first three months of employment with the last employer prior to the Claim for Compensation being filed. Based on the Court's application of 287.067.7 in this case a Claimant could be diagnosed with carpal tunnel syndrome ten times in one month by ten different doctors during the Claimant's last month of employment with a company then work

for a new employer for three and a half months, file a Claim for Compensation, and the last employer would be liable for the workers' compensation benefits. However, in this exaggerated example it is clear that the "cause" of the Claimant's injury occurred before his employment at the last employer.

The Court of Appeals, Southern District, agreed with and applied Appellant's argument in the present case when deciding Endicott v. Display Technology (SC84044). The facts of Endicott are almost identical to the facts presented in this case. The employee was diagnosed with bilateral carpal tunnel syndrome after working for the first employer, Display Technology, for approximately sixteen years. She had surgery on one wrist only while working for Display Technology. She worked for two different employers for short periods before ultimately working for Graphic Technologies. She did not file any Claim for Compensation until after working at Graphic Technologies for over three months. Also, there was no "rediagnosis" of the bilateral carpal tunnel syndrome in the first three months of the Claimant's work at Graphic. The Court in Endicott found the first employer liable for workers' compensation benefits for those conditions that were diagnosed while the Claimant was employed with the first employer, bilateral carpal tunnel syndrome. They placed liability on Graphic Technologies for conditions that were not diagnosed until she began working at Graphic Technologies, specifically thoracic outlet syndrome. The decision in the case at bar cannot be harmonized with Endicott.

It is clear in this case that the Claimant's forty-three years of work at Southern Equipment is the "cause" of his bilateral carpal tunnel syndrome. The Claimant was diagnosed

with the disease in 1990 based on a clinical exam by Dr. Phillips and Dr. Petkovich. He was also diagnosed by an EMG\NCV in 1990 with bilateral carpal tunnel syndrome. Finally, Dr. Petkovich recommended the Claimant have surgery for the carpal tunnel condition in 1990. All doctors have stated that it is Claimant's job duties as a sheet metal worker that has caused his condition. Dr. Phillips also stated that as the condition was diagnosed while at Southern, and due to the number of years of work at Southern, they were the cause of the condition. Based on the above and the testimony of all doctors, the job duties at Southern were the substantial contributing factor in the development of his condition.

As the Claimant was not exposed to the hazards of repetitive trauma for three months, nor even one day, at National Fabco *before the diagnosis of the condition* and because the evidence demonstrates that Southern's exposure of the Claimant to repetitive trauma is the substantial contributing factor to the development of his condition, they are liable. Southern cannot shift liability to a prior employer as they employed the Claimant for over three months, approximately 37 years, prior to the diagnosis date.

THE ANALYSIS OF THE LAST EXPOSURE

RULE AND ITS EXCEPTION

Occupational diseases caused by repetitive motion, as opposed to exposure, are subject to the following analysis. The date the claim is filed is the starting point pursuant to Johnson. Johnson v. Denton Construction Co., 911 S.W.2d 286 (Mo. banc 1995). No employer can be liable for injury or occupational disease by repetitive motion if they only employed the Claimant after the date the claim was filed. If there was no diagnosis of the occupational disease before the claim was filed, then the last employer to expose the Claimant to the hazards of repetitive trauma before the claim was filed is liable unless (1) Claimant was not exposed to repetitive motion for three months at this employer, and (2) evidence establishes that the prior employer was the substantial contributing factor. The employer on the date the Claim is filed is entitled to the protections of the "three month exception" to the last exposure rule even if there has been no diagnosis at that time. Presumptively, the employer on the date of Claim filing is the "cause" of the injury when there is no diagnosis of the condition. This is not the end of the analysis, however.

If a diagnosis of the occupational disease by repetitive motion occurs before the claim was filed, the employer on the date of diagnosis is liable, not the employer on the date the claim was filed. The employer, on the date of diagnosis is liable, unless (1) the employer on the date of diagnosis did not expose the Claimant to the hazards of repetitive motion for three months, and (2) the evidence demonstrates that a prior employer was the substantial contributing factor.

There is no concern with the statute of limitations as it does not begin to run against a Claimant until he is reasonably aware that the occupational disease by repetitive motion was caused by the job duties. Wiele v National Supermarkets, Inc., 948 S.W.2d. 142, 145 (Mo. App. E.D. 1997).

The Last Exposure Rule and the Exception to the Last Exposure Rule as outlined above will still be the rule of convenience as it was designed. However, it will also serve the function intended. That is to give practical and equitable resolution to cases where an employee has been exposed to the hazards of repetitive trauma by multiple employers. This analysis of the Rules will also allow the injured worker to receive medical treatment in an expeditious manner.

CONCLUSION

Based on the evidence, application of sections 287.063 and 287.067.7, and the relevant case law, Southern Equipment is responsible for all benefits owed to Claimant. The Appellant, National Fabco, requests the Court to reverse the decision of the Court of Appeals and the Labor and Industrial Relations Commission and enter an Order consistent with the proper analysis of sections 287.063 RSMo 1993 and 287.067.7 RSMo 1994 whereby finding Southern liable for benefits awarded by the Administrative Law Judge.

Respectfully submitted,
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EXHIBIT A

A time line of the relevant dates and employment is included as Exhibit A.

TIME LINE

1. **October 8, 1952 - March 31, 1995:** Claimant employed by Southern Equipment.
2. **April 17, 1995 - August 7, 1995:** Claimant employed by Quipco in the State of Illinois.
3. **August 8, 1995 - March 3, 1997:** Claimant employed by National Fabco.
4. **February of 1990:** Claimant jerked his right shoulder while lifting a heavy die with a co-worker. Claimant subsequently had symptoms of right upper extremity discomfort.
5. **November 5, 1990:** Claimant saw Dr. Petkovich regarding his right upper shoulder. Dr. Petkovich felt that claimant had bilateral carpal tunnel syndrome and referred claimant to Dr. Phillips.
6. **November 17, 1990:** Claimant saw Dr. Phillips and complained of numbness in his hands. Dr. Phillips indicated that Claimant had symptoms of bilateral carpal tunnel syndrome.
7. **November 30, 1990:** Dr. Petkovich diagnosed Claimant with carpal tunnel syndrome in both hands and recommended surgical release for the left hand. Dr. Petkovich also diagnosed the Claimant with tendonitis in both shoulders, with the left being worse.
8. **December 13, 1996:** Claimant saw Dr. Phillips again regarding earlier-diagnosed carpal tunnel syndrome. Dr. Phillips recommended that Claimant see an orthopedic surgeon.
9. **December 30, 1996:** Dr. Petkovich confirmed his 1990 diagnosis of bilateral carpal tunnel

syndrome and bilateral shoulder rotator cuff tendonitis and recommended that Claimant undergo carpal tunnel surgery and a cortisone injection in each shoulder.

10. **March 12, 1997:** Claimant filed a Claim for Compensation against National Fabco, Quipco, and Souther Equipment.

11. **August 20, 1997:** Claimant was examined by Dr. Benz, an orthopedic surgeon. Dr. Benz recommended carpal tunnel syndrome for both hands and an arthogram of the left shoulder.

12. **September 2, 1997:** Dr. Benz recommended surgical repair of the left shoulder.

13. **October 1, 1997:** Dr. Benz performed a right carpal tunnel release and a right Guyon's canal release.

14. **November 19, 1997:** Claimant underwent surgery for the left carpal tunnel syndrome and left Guyon's canal syndrome.

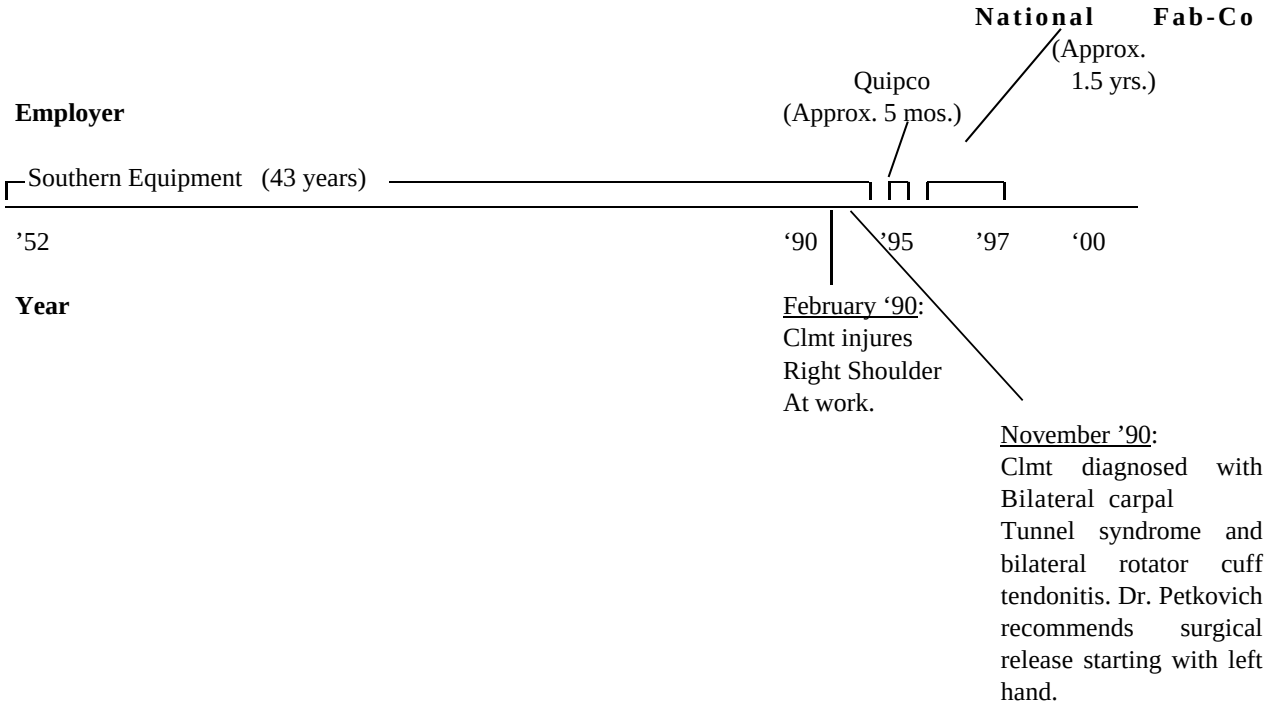
15. **January 7, 1998:** Dr. Benz again recommended left shoulder surgery.

16. **March 19, 1998:** Claimant underwent surgery on his left shoulder.

17. **May 20, 1998:** Claimant was released to full activities by Dr. Benz.

18. **August 7, 1998:** Dr. Benz indicated claimant had reached maximum medical improvement.

Claimant's Employment and Injury Timetable



CERTIFICATE OF COMPLIANCE

The undersigned certifies that appellant's substitute brief complies with the limitations in Special Rule No. 1 and Rule 84.06 of the Missouri rules of Civil Procedure, contains 6054 words, and that the computer disk filed with appellant's brief under Rule 84.06 has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 12th day of February, 2002, a copy of Appellant's Substitute Brief was sent via overnight mail to:

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